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No. 91-1698

In The

Supreme Court of the United States

October Term, 1991

ROGER OLSON

Petitioner,

vs.

GENERAL DYNAMICS CORPORATION, ALLIED SIGNAL, INC., AMEX SYSTEMS CORPORATION, SCIENCE APPLICATIONS INTERNATIONAL CORPORATION and SAIC RANGE SYSTEMS,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

May the federal courts devise a federal common law remedy of equitable estoppel to create an exception to ERISA's expansive preemption clause, which preempts all state law claims that relate to employee benefit plans?

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STATEMENT OF THE CASE

Factual History

Respondents Allied-Signal, Science Applications International Corporation, SAIC Range Systems (formerly Amex Systems Inc. ("Amex")) (collectively referred to as "respondents" unless separate distinction is necessary) are satisfied with Olson's summary of his employment history. Respondents also agree that during a transition meeting with General Dynamics employees, the Amex president stated:

> I commit to you that in no way will you be injured. On the bottom line, you will be equal or better to your present position. The details of this will be discussed in personal interviews and they'll be scheduled shortly . . . .

C.R. 28, Exhibit B.[1] However, by omitting certain material facts, Olson has failed to place this allegedly misleading statement in its proper context.

Olson claims that he interpreted the president's remark as a promise that his Amex benefits would be identical to his General Dynamics benefits in every detail. Since Olson had already received copies of the Amex plan summaries prior to the meeting, however, his claimed interpretation was plainly unreasonable. C.R. 28, Exhibit A at 57-58. Other statements made at the same meeting also belie the reasonableness of Olson's interpretation.

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[1] Citations in this memorandum to "C.R." refer to the clerk's record filed with the Ninth Circuit Court of Appeals.

For example, General Dynamics and Amex representatives discussed the specific provisions of the Amex benefit plans, including vacation, sick leave, and retirement, at the meeting. C.R. 28. Moreover, the general manager of Amex stated that there would be differences in "each person's position or status as they come over to Amex" and that such differences would be discussed "in detail in private interviews on an individual basis . . . " C.R. 28, Exhibit B at 15-16. Thus, even during the meeting in which Olson claims the fraudulent misrepresentation occurred, he was or reasonably should have been aware that the Amex benefits would *not* be identical to the General Dynamics benefits.

Moreover, Olson did not rely on the alleged representation in accepting Amex's job offer. He knew exactly what his Amex benefits would be, and that they would be less than he would have received had he not been terminated by General Dynamics. Olson's deposition testimony is clear on this point:

> By Mr. Pulliam:
>
> Q. So there is no question in your mind that *at the time that you accepted Amex's offer of employment you were aware that the benefit package* that would be available to you *at Amex was not equivalent* to the benefit package that you had received at General Dynamics and which you would continue to receive at General Dynamics if the option of remaining in General Dynamics' employ was available to you, correct?
>
> A. That was my impression at the time and as expressed in the [acceptance] letter.

C.R. 28, Exhibit A at 116 (emphasis added). Olson's acceptance letter to Amex contained four pages of calculations detailing the differences he perceived between the General Dynamics benefits and the Amex benefits. In that letter, Olson also stated:

> The reason for my acceptance is not that I find the offer attractive, or even fair and reasonable. It is rather that there is no other way to forestall the immediate loss of very substantial early retirement benefits arising from my employment with General Dynamics Corporation.

C.R. 28, Exhibit C. In yet another memorandum prepared by Olson, he stated:

> I was informed that, if I did not accept employment with Amex my early retirement benefits at age 55 would be "actuarially reduced." It was explained that this meant by 63.48 percent . . . . Since a loss of this magnitude would be extremely difficult to overcome, I had little choice but to accept the Amex offer in spite of its deficiencies.

C.R. 28, Exhibit D.

Procedural History

On April 17, 1989 Olson filed his original complaint in state court alleging breach of contract, third party beneficiary, negligent misrepresentation, promissory estoppel, conspiracy to defraud, and common count. Stripped of legalese, Olson simply alleged that he was promised benefits he did not receive.

Respondents removed the action to the United States District Court for the Southern District of California, and promptly moved to dismiss on the grounds that Olson's state common law claims were preempted by ERISA. At the hearing on respondents' motion to dismiss, Olson abandoned the legal theories of his original complaint, which eschewed ERISA and alleged almost every common law cause of action except intentional fraud. Instead, Olson's lawyer relied exclusively on "what [he] believe[s] to be a fraud exception to the general line of cases that were cited by the moving parties . . . . " Hearing Transcript at p. 4. The district court granted the motion to dismiss, holding that Olson's "allegations of broken promises . . . relate[ ] to the benefit plan." *Id.* at 6.

The district court graciously permitted Olson to file an amended complaint to allege common law fraud, discrimination under ERISA (against General Dynamics only), and declaratory relief. In his declaratory relief claim, Olson alleged "that if ERISA provides no remedy for the action of defendants and each of them, this Court has the power under 28 U.S.C. § 2201 and the doctrine of federal common law to devise an appropriate remedy commensurate with the fraud committed by defendants and each of them." Absent from this first (and final) amended complaint was Olson's original claim for promissory estoppel.

General Dynamics once again moved to dismiss. The remaining respondents joined in that motion and separately moved for summary judgment on grounds of ERISA preemption. The district court granted both motions, holding that "[e]ven if there was a misrepresentation, and the court does not find that there was one, his

claim arises as a participant in both ERISA plans and consequently relates to those plans and is preempted." The court also declined to create an exception to ERISA preemption under federal common law, holding that "to devise a special remedy for Olson's fraud claim . . . would defeat the scheme created by Congress in ERISA."

On appeal, the Ninth Circuit affirmed the district court's judgment in every respect. Olson petitioned for rehearing, asserting equitable estoppel as the basis although he had not raised that legal theory previously. The Ninth Circuit denied that petition without comment.

REASONS FOR DENYING THE WRIT

Certiorari should be denied because Olson bases his petition on a newly asserted claim of equitable estoppel, a claim Olson did not plead in his complaint or argue on summary judgment or appeal. Moreover, there is no genuine conflict among the circuits about whether the district court may devise a federal common law remedy as an exception to ERISA preemption – the issue raised below and before this Court. Finally, Olson's fraud claim is frivolous; he testified under oath that he knew exactly what his benefits would be before accepting employment with Amex and, therefore, did not justifiably rely on any alleged misrepresentation. Even if the Court found a legal basis for creating a federal common law exception to ERISA preemption, this case does not present the facts to warrant such an exception.

I. Olson Asserts a New Issue in his Petition for Certiorari.

Olson mischaracterizes the proceedings below in an attempt to obtain Supreme Court review based on the doctrine of equitable estoppel. In his original complaint Olson did allege promissory estoppel, but he consciously abandoned that legal theory in favor of fraud after he lost on respondents' first motion to dismiss. In the complaint governing this lawsuit – the first amended complaint – Olson did not plead a claim for equitable estoppel. In opposition to respondents' motion for summary judgment, Olson did not argue equitable estoppel and the district court did not consider it. On appeal, Olson again did not assert, and the Ninth Circuit again did not consider, a claim of equitable estoppel.

This Court previously has expressed a policy against considering issues raised for the first time in a petition for certiorari. In *Delta Airlines, Inc. v. August*, 450 U.S. 346 (1981), for example, the Court refused to consider the question of the district court's abuse of discretion in denying respondents' costs, stating that the issue "was not raised in the Court of Appeals and is not properly before us." 450 U.S. at 362. *Accord Youakim v. Miller*, 425 U.S. 231, 233 (1976) (the Court "does not decide questions not raised or resolved in the lower court" except in extraordinary cases).

Olson had ample opportunity to argue for equitable estoppel in the prior proceedings. He deliberately chose not to do so. His decision is not an extraordinary basis for granting certiorari now.

II. There Is No Genuine Conflict Among the Circuits Concerning the Scope of ERISA Preemption.

In an effort to manufacture a conflict among the circuits, Olson erroneously contends in his petition that "[t]he Ninth Circuit has stated that Olson . . . has no remedy under ERISA as a defrauded employee." Petition at 8. Moreover, Olson falsely attributes to the Ninth Circuit the holding that "[l]ying to employees is permissible under ERISA provided the lie is not in writing." *Id.* at 9. On these misstatements, Olson posits a conflict because "[o]ther circuits have come to a different conclusion." *Id.*

A. Olson Does Not Have a Wrong Without a Remedy.

In the first place, Olson *did* have a remedy under ERISA. He simply chose not to pursue it. In its opinion, the Ninth Circuit expressly recognized section 502(a)(1)(B) of ERISA, which provides civil remedies for plan participants. "At the time he filed this suit, Olson was therefore a 'participant' in each company's employee benefit plan, and he had the option of brining a suit under § 502(a)(1)(B)."

The fact that Olson could have pursued his claim under ERISA, but did not, underscores the absurdity of his contention that ERISA preemption of a state common law fraud claim leaves him with a wrong but not a remedy. It is simply not true, and neither the district court nor Ninth Circuit ever held, that Olson has no remedy at all. He merely has no remedy under state common law.

Presumably, Olson did not pursue a remedy under ERISA section 502(a)(1)(B) because, as the Ninth Circuit recognized, "ERISA's civil remedy probably does not extend to claims of oral misrepresentation regarding the level of benefits provided by a plan." *See Hozier v. Midwest Fasteners, Inc.*, 908 F.2d 1155, 1164 (3rd Cir. 1990) ("an ERISA welfare plan is not subject to amendment as a result of informal communications . . . . "); *Pizlo v. Bethlehem Steel Corp.*, 884 F.2d 116, 120 (4th Cir. 1989) (informal or unauthorized modification of pension plans is impermissible under ERISA); *Cefalu v. B.F. Goodrich Co.*, 871 F.2d 1290, 1297 (5th Cir. 1989) ("an oral agreement cannot be the basis of a cause of action under ERISA"); *Degan v. Ford Motor Co.*, 869 F.2d 889, 895 (5th Cir. 1989) ("ERISA precludes oral modifications to benefit plans"); *Straub v. Western Union Telegraph Co.*, 851 F.2d 1262 (10th Cir. 1988) ("no liability exists under ERISA for purported oral modifications of the terms of an employee benefit plan"); *Musto v. American General Corp.*, 861 F.2d 897, 910 (6th Cir. 1988), *cert. denied*, 490 U.S. 1020 (1989) ("a written employee benefit plan may not be modified or superseded by oral undertakings on the part of the employer"); *Northwest Administrators, Inc. v. B.V. & B.R., Inc.*, 813 F.2d 223, 226-27 (9th Cir. 1987) ("an oral agreement or tacit understanding . . . that conflicts with or alters the meaning of the written agreement should not be considered"); *Nachwalter v. Christie*, 805 F.2d 956, 960 (11th Cir. 1986) ("this requirement that ERISA plans must be 'maintained' in writing precludes oral modification of the Plans").

Because Olson's fraud claim is premised on an alleged oral representation that in effect would modify the written plan, Olson would be unlikely to prevail

under ERISA. However, the fact that Olson may lose if he were to assert a claim under ERISA does not mean, as he contends, that he has suffered a wrong without a remedy. It means only that Congress has elected to disallow claims of the type that Olson seeks to assert in order to further the regulatory goals of ERISA. As this Court held in *Pilot Life Inc. Co. v. Dedeaux*, 481 U.S. 41 (1987):

> The policy choices reflected in the inclusion of certain remedies and the exclusion of others under the federal scheme would be completely undermined if ERISA-plan participants and beneficiaries were free to obtain remedies under state law that Congress rejected in ERISA.

Id. at 54.

In any event, whether Olson would win or lose a claim asserted under ERISA is merely an academic exercise because Olson did not sue under ERISA and respondents never had the opportunity to argue that an oral representation cannot modify a written plan. The Ninth Circuit was careful to note this fact:

> It is important to emphasize that Olson has not asserted a claim under § 502(a)(1)(B), ERISA's civil remedial scheme. That cause of action is discussed here only to address the argument that Olson has no remedy available to him if his fraud claim is preempted by ERISA.

B. Olson's Authority Is Inapposite.

The cases Olson cites as evidence of a conflict among the circuits would be apposite only if Olson has sued under ERISA and raised the substantive question of

whether federal courts may apply the doctrine of equitable estoppel to create an exception to the general rule that oral representations cannot modify the terms of a written ERISA plan. That, of course, did not occur since Olson consciously chose *not* to sue under ERISA to avoid confronting the general rule in the first place. The issue here, by contrast, is whether federal courts may apply the doctrine of equitable estoppel to create an exception to ERISA preemption and thereby allow Olson to by-pass ERISA altogether.

For example, Olson relies on *Armistead v. Vernitron Corp.*, 944 F.2d 1287 (6th Cir. 1991), where several employees elected early retirement from Vernitron based on their belief that their retirement insurance benefits had been carried over from a previous ERISA plan. When Vernitron tried to terminate those retirement insurance benefits, the employees sued to equitably estop Vernitron from doing so. Citing *Nachwalter v. Christie*, 805 F.2d 956, 960 (11th Cir. 1986) – one of the cases holding that written ERISA plans may not be modified orally – Vernitron argued "against being estopped from denying insurance benefits [because] ERISA's requirement that a welfare plan be in writing precludes the application of equitable estoppel." *Vernitron*, 944 F.2d at 1299. Distinguishing *Nachwalter* on the basis that it involved a pension benefit plan as opposed to a welfare benefit plan, the court concluded that "the purpose of Congress in enacting 29 U.S.C. § 1102(a) would not be frustrated by estoppel principles. . . . "[2] *Id.* at 1300.

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[2] 29 U.S.C. requires that an ERISA plan be in writing.

Olson also relies on *Black v. TIC Investment Corp.*, 900 F.2d 112 (7th Cir. 1990). Black was terminated from his employment in connection with the sale of White Farm Equipment Company, Black's employer, to TIC Investment Corporation. White officials promised Black severance pay pursuant to an ERISA plan and, since White had gone into Chapter 11 bankruptcy, gave Black the option of filing a claim in bankruptcy or receiving a lesser cash payment of two months' salary. Black opted to file a claim in bankruptcy. White subsequently objected to that claim and the court dismissed it. Black sued under ERISA to equitably estop TIC (White's successor) from denying his severance benefits. Using essentially the same reasoning as *Vernitron*, the court held "that estoppel principles are applicable to claims for benefits under unfunded single-employer welfare benefit plans under ERISA." *Black*, 900 F.2d at 115.

Thus, in both *Vernitron* and *Black*, the plaintiffs sued under ERISA for equitable estoppel, the defendants raised the defense that ERISA does not permit oral modifications to written plans, and the courts concluded that the doctrine of equitable estoppel can be used to create an exception to ERISA's written plan requirement in the narrow case of unfunded welfare benefit plans. *Vernitron* and *Black*, therefore, could not possibly be in conflict with the Ninth Circuit's present opinion because Olson did not sue under ERISA and respondents consequently never had the opportunity to argue that ERISA does not permit oral modifications to a written plan. Whether equitable estoppel can be used to create an exception to ERISA's written plan requirement – the issue involved in *Vernitron* and *Black* and possibly in conflict with other circuits – has

never been an issue in this case. Olson's petition for certiorari is a proverbial case of comparing apples and oranges; it does not present a conflict among the circuit courts.[3]

C. The Circuit Courts Unanimously Have Held that ERISA Preempts State Common Law Claims.

In this case, the relevant issue is whether a federal court may carve out an exception to ERISA preemption of state common law claims based upon the doctrine of equitable estoppel. The Ninth Circuit's holding that common law claims such as Olson's are preempted by ERISA is in accordance with every one of the circuit courts that, on materially indistinguishable facts, has considered this question of ERISA preemption. *See Phillips v. Amoco Oil Co.*, 799 F.2d 1464 (11th Cir. 1986), *cert. denied*, 481 U.S. 1016 (1987); *Straub v. Western Union Telegraph Co.*, 851 F.2d 1262 (10th Cir. 1988); *Cefalu v. B.F. Goodrich Co.*, 871 F.2d 1290 (5th Cir. 1989); *Anderson v. John Morrell & Co.*, 830 F.2d 872 (9th Cir. 1987); *Blau v. Del Monte Corp.*, 748 F.2d 1348 (9th Cir. 1985), *cert. denied*, 474 U.S. 865 (1985).

Like the present case these cases involve participants in identifiable employee benefit plans. They involve the

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[3] As further evidence that there is not a conflict among the circuits, the Sixth Circuit has not found its decision in *Vernitron* to be in conflict with its decision in *Musto v. American General Corp.*, 861 F.2d 897, 910 (6th Cir. 1988), where it held that "a written employee benefit plan may not be modified or superseded by oral undertakings on the part of the employer." Olson's case, like *Musto*, is distinguishable from *Vernitron*.

sale, transfer, or closure of plaintiffs' place of employment. They involve alleged oral representations about the benefits the plaintiffs will be eligible to receive. They involve plaintiffs who ultimately did not receive the exact benefits they believed they should receive. And they all involve common law tort or contract claims, including fraud. Upon these facts, essentially identical to Olson's, the circuit courts unanimously have held that ERISA preempts common law claims.

III. Granting Olson a Special Remedy Would Thwart the Statutory Scheme.

In essence, Olson is demanding that the Court invoke federal common law to judicially overrule Congress's explicit preemption clause and read a preempted state claim back into ERISA. While federal common law may appropriately be consulted to aid in interpreting ERISA when interpretation is necessary, federal courts should not be allowed to use it to circumvent Congress's considered policy choice that assures equity among plan participants and preserves the actuarial integrity of ERISA plans. In a similar case where the plaintiff presented "a sympathetic, estoppel-based argument for fashioning federal common law," the Fifth Circuit reasoned cogently: "the problem, however, is one for Congress and not for this court to resolve. . . . " *Degan v. Ford Motor Co.*, 869 F.2d 889, 895 (5th Cir. 1989).

IV. Olson's Fraud Claim is Frivolous.

Although the courts below disposed of Olson's claim by noting correctly that it is preempted by ERISA, the

district court could have granted summary judgment and the Ninth Circuit could have affirmed on the merits. *Fine v. Barry and Enright Productions,* 731 F.2d 1394, 1396 (9th Cir. 1984), *cert. denied* 469 U.S. 881 (1984) (appellate courts "may affirm summary judgment on any ground appearing on the record whether or not the district court relied on it"). Olson's state law fraud claim must fail since the facts of this case do not satisfy the basic elements of fraud; namely, misrepresentation and justifiable reliance. *See Girard v. Ball,* 125 Cal. App. 3d 772, 783, 178 Cal. Rptr. 406 (1981). Neither would the facts support a claim for equitable estoppel, if Olson had alleged it, since justifiable reliance is an element of equitable estoppel and is wholly lacking here. *Vernitron,* 944 F.2d at 1298.

Olson's state law fraud claim rests solely on the alleged misrepresentation that he would "be equal or better to [his] present position" if he went to work for Amex. C.R. 28, Exhibit A at 48-49. Olson's admissions about events immediately before and after the alleged misrepresentation, however, demonstrate that he knew all along precisely what the Amex benefits would be, and that he accepted employment with Amex in spite of marginally less benefits. For example, before the alleged misrepresentation, Olson had obtained documents that detailed the benefits he would receive as an Amex employee. Amex representatives specifically identified the Amex benefits within minutes of the alleged misrepresentation. In his acceptance letter to Amex, Olson himself described in detail the disparities he perceived between the benefits offered by his former employer and those offered by Amex. And he testified under oath that at the time he accepted Amex's employment offer, he

knew his Amex benefits would be less than his General Dynamics benefits had been.

Olson was not misled by the alleged misrepresentation, nor did he justifiably rely on it. Misrepresentation and justifiable reliance are necessary elements of fraud and equitable estoppel. Consequently, Olson's state law fraud claim assuredly would fail even if it were not preempted by ERISA. Similarly, even if federal courts were allowed to create an exception to ERISA preemption based on equitable estoppel – a proposition for which there is no authority – Olson could not state a prima facie case.

CONCLUSION

Certiorari should be denied because Olson relies on equitable estoppel without pleading it or asserting it in the proceedings below. Olson's contention that there is a conflict among the circuits simply misstates the procedural history of this case and the law. The preemptive scope of ERISA is expansive and does not permit a federal common law exception based on equitable estoppel or otherwise. As the Ninth Circuit correctly held, granting Olson the special remedy he seeks would allow him to circumvent the entire statutory scheme of ERISA.

There is no authority for such a remedy. Olson's petition should be denied.

Respectfully submitted,

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